

# An Unconstitutional Setback

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Turkey signed “The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence”, also known as the [Istanbul Convention](#), in May 2011. It was the first country to ratify the Convention in March 2012, with the unanimous votes of all parties represented in the Turkish Parliament, resulting in the Law on the Protection of the Family and Prevention of Violence Against Women (“[Law No. 6284](#)”). Then, the ratification of the Istanbul Convention was explicitly [praised](#) by the current President Recep Tayyip Erdo#an. However, after almost 10 years, President Erdo#an issued a decision on Saturday, 20 March, withdrawing Turkey from the Convention. This move was met by large protests.

The withdrawal from the Istanbul Convention constitutes an unconstitutional setback, not only in the protection of at risk women, but also in terms of President Erdo#an’s usurpation of legislative powers.

## The Context

Since its ratification, pro-government and conservative newspapers have constantly tried to [discredit](#) the Istanbul Convention, claiming that it was a threat to Turkish family structures. Supposedly, it would cause the dissolution of families because it forces the state to take action upon the request of women. The same actors also [claimed](#) that the Convention legitimizes same-sex relations or cohabitation without marriage, which contradicts the Islamic understanding of family. During these debates, the Justice and Development Party – President Erdo#an’s AKP – had [no clear standing](#), as certain party members were in favor of the Istanbul Convention while others supported the withdrawal.

There had been no public support for the withdrawal, as well. The Women and Democracy Foundation, a non-governmental organization of which President Erdo#an’s daughter Sümeyye Erdo#an Bayraktar is the Vice President, [declared their support](#) for Istanbul Convention. Most opposition parties requested that the Turkish state should apply the Istanbul Convention *more* effectively. Further, according to public opinion polling performed by Konda in August 2020, 36% of the participants supported Istanbul Convention, only 7% supported the withdrawal, while 58% [did not have an opinion](#). Contrary to public sentiment, however, in January 2021, O#uzhan Asiltürk, a member of the Felicity Party which opposed the Istanbul Convention, declared that the AKP, including President Erdo#an, likewise now [supported the withdrawal](#).

Indeed, on 20 March 2021, Turkey woke up to the [Presidential Decision No. 3718](#) with which Turkey withdrew from the Istanbul Convention. President Erdo#an relied on the authority provided by Article 3 of the Presidential Decree No. 9, foreseeing the President’s right to “terminate” international agreements. This move was sudden, but

somehow expected. It can be assumed that the AKP gave up on their commitment to the Istanbul Convention in exchange for the support of certain conservative parts of society; either for [recently-introduced](#) discussions on constitutional amendments or for a possible early election.

## Validity of the Presidential Decision

Regardless of the reason behind the Presidential Decision, its validity and the validity of the Presidential Decree are highly questionable. The main point of contention is whether the President has the right to issue a presidential decree on the termination of international agreements. [Article 90/1 of the Constitution of the Republic of Turkey](#) stipulates that international agreements are subject to adoption by the Turkish Parliament with a statutory law approving the ratification. It does not foresee any procedure for withdrawal or termination. Therefore, in line with the principle of parallelism of competence and procedure, the Turkish Parliament should have the authority to withdraw from international agreements by enacting a statutory law, in absence of any other constitutional provision regulating the termination. This argument is reinforced by the fact that per [Article 90/5 of the Turkish Constitution](#), international agreements that are duly put into effect have the force of statutory law. The Turkish Constitution further states that provisions of international agreements related to fundamental rights and freedoms – such as the Istanbul Convention – prevail in the event of a conflict with the statutory law.

Among the President's explicitly recognized rights with regards to the issuance of presidential decrees (e.g. right to regulate the procedure and principles governing the appointment of high ranking executives), [Article 104/11 of the Turkish Constitution](#) foresees that the President ratify and publish international agreements. This authority depends on the prior parliamentary enactment of a statutory law approving the ratification, save for a few exceptions. Therefore, the Turkish Constitution does not grant any explicit authority to the President to issue a presidential decree which recognizes the President's authority to terminate an international agreement. However, according to [Article 104/17 of the Turkish Constitution](#), the President has a general authority to issue presidential decrees on matters regarding executive power. But what is the scope of the “executive power”?

According to [Article 8 of the Turkish Constitution](#), “executive power and function should be exercised and carried out by the President [...] in conformity with the Constitution and statutory laws”. The ratified treaties are in the force of statutory law, which, pursuant to [Article 87 of the Turkish Constitution](#), the Turkish Parliament has the authority to enact, amend and repeal. Therefore, it can be concluded that the right to repeal law is within the scope of legislative power. As Article 7 of the Turkish Constitution stipulates that “legislative power is vested in the Grand National Assembly of Turkey on behalf of Turkish Nation. This shall not be delegated”, it is possible to conclude that the President's assuming of such legislative functions constitutes a usurpation of power.

[Article 104/17 of the Turkish Constitution](#) also foresees that “the fundamental rights, individual rights, and duties included in the first and second chapters and the political

rights and duties listed in the fourth chapter of the second part of the Constitution shall not be regulated by a presidential decree". The Istanbul Convention is primarily related to the right to life and the right to protect corporeal and spiritual existence, rights which are listed in the second chapter of the second part of the Turkish Constitution. The President has no right to issue a presidential decree with regards to the withdrawal from the Istanbul Convention. Thus, the Presidential Decree is unconstitutional.

## Ways Forward

Having established that the Presidential Decree is unconstitutional, what opportunities do the supporters of the Istanbul Convention have? The Turkish Constitution recognizes both the abstract and the concrete constitutional review of presidential decrees as stipulated in Articles 150 and 152 of the Turkish Constitution, respectively. However, it is no longer possible to file an application for an abstract constitutional review for the annulment of the original Presidential Decree, enabling Saturday's Presidential Decision, as the timespan foreseen under the Turkish Constitution has passed. Although the main opposition party had applied to the Turkish Constitutional Court and [requested the annulment](#) of certain provisions of the Presidential Decree, Article 3 was [not one of these provisions](#).

Therefore, it is only possible to resort to concrete constitutional review per [Article 152 of the Turkish Constitution](#) and claim the unconstitutionality of the Presidential Decree after filing an administrative lawsuit for the cancellation of an administrative act: the Presidential Decision. Any person with an interest in filing the lawsuit (e.g. women or non-governmental organizations fighting for gender equality), should file a cancellation lawsuit requesting the annulment of the Presidential Decision for unconstitutionality before the Council of State ([Article 24 of the Law on Council of State no. 2575](#)). Upon this claim, or if the Council of State itself finds it unconstitutional, the Council of State should submit this claim to the Turkish Constitutional Court, which can pursue a concrete constitutional review. If the Turkish Constitutional Court agrees that the Presidential Decree is unconstitutional, the Council of State can cancel the Presidential Decision.

Hoping that the Turkish Constitutional Court stands by the Turkish Constitution, we should also ask what happens if the Turkish Constitutional Court decides otherwise or the Turkish Legislature withdraws from the Istanbul Convention, in accordance with the Turkish Constitution. This would not mean that there is no mechanism to combat violence against women, as Turkish legislation, including Law No. 6284 or the [Turkish Criminal Code no. 5237](#), provide tools for this purpose. However, considering [67 women were killed](#) in the first 65 days of 2021, despite the existence of the Istanbul Convention – signaling that the implementation of the Convention was already lacking – withdrawal constitutes a very unfortunate setback, as it signals that the Turkish state has no solid intention to protect women. Thus, we should all stand for Istanbul Convention and its due application.